Exotic Skyline Sdn Bhd v Hamid bin Naib & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(NCC)(A)-730–04 OF 2016 AND W-02(NCC)-731–04 OF 2016
IDRUS HARUN, HASNAH HASHIM AND YEOH WEE SIAM JJCA
20 APRIL 2018

Contract — Specific performance — Deed of settlement — Failure to develop property — Inherent absence of director and company secretary to enter into agreement — Whether agreement and subsequent instruments rendered null and void ab initio — Whether alleged director authorised to sign deed of settlement on behalf of company — Whether deed of settlement binding on parties — Whether there was acquiescence and waiver by parties

The sixth defendant was the registered owner of a piece of land. The first, second, third, fourth and sixth defendants were shareholders in the sixth defendant while the fifth defendant was the director. The first to fourth defendants entered into a share sale agreement ('the first SSA') to sell their shares to the appellant. However, the first, second and fifth later executed a deed of revocation on the ground that the appellant breached the first SSA and to substitute it with a new shareholder agreement ('the second SSA'). The first, second and fifth defendants executed a deed of settlement ('DOS') with the plaintiff. Simultaneously, the first defendant executed a deed of trust with the plaintiff. The plaintiff contended that the defendants breached the DOS for failing to develop the property and by offering the sale of the sixth defendant's shares to a third party ('Nirvana'). The plaintiff lodged a private caveat on the said property and issued notices of demand, demanding the defendants to comply with the terms of the first SSA. Some time in 2014, the defendants offered to sell the property to the plaintiff and demanded the full purchase price be paid within six months. The plaintiff filed an originating summons at the High Court against the defendants for specific performance. The High Court held in favour of the plaintiff and the first SSA was found to be void ab initio. Hence the present appeals.

Held, dismissing the appeals with costs:

(1) The inherent absence of the alleged director and company secretary to enter into the first SSA has rendered the first SSA and the subsequent instruments a nullity and void ab initio. Between the years 2005 and 2014, neither party took any steps to enforce any of the terms as agreed under the DOS. The records of the Companies Commission of Malaysia ('CCM') clearly revealed that the director, Murugayah, was only

appointed as a director of the plaintiff in 2010. Murugayah had signed the DOS in 2005. Therefore, the execution of the DOS by Murugayah lacked any legal premise. There was also no evidence of authorisation given to Murugayah to sign the DOS on behalf of the plaintiff. The DOS was not binding on the defendants (see paras 29 & 32).

(2) The parties awoke from their slumber only in 2014, almost 15 years after the execution of the DOS. There were acquiescence and waiver by both the plaintiff and the defendants on the delay of enforcing the DOS. Furthermore, 15 years after the execution of the DOS, the sale and transfer of the shares, as agreed under the DOS have yet to be materialised and concluded (see para 36).

[Bahasa Malaysia summary

Defendan keenam adalah pemilik berdaftar sebidang tanah. Defendan pertama, kedua, ketiga, keempat dan keenam adalah pemegang saham dalam defendan keenam manakala defendan kelima adalah pengarahnya. Defendan pertama dan keempat menandatangani perjanjian jualan saham ('SSA pertama') untuk menjual saham mereka kepada perayu. Walau bagaimanapun, defendan pertama, kedua dan kelima kemudian menyempurnakan surat pembatalan atas alasan perayu melanggar SSA pertama dan menggantikannya dengan perjanjian pemegang saham baharu ('SSA kedua'). Defendan pertama, kedua dan kelima menyempurnakan surat ikatan penyelesaian ('DOS') dengan plaintif. Pada masa yang sama, defendan pertama menyempurnakan surat ikatan amanah dengan plaintif. Plaintif berpendapat defendan melanggar DOS kerana gagal membangunkan hartanah tersebut dan dengan menawarkan penjualan saham defendan keenam kepada pihak ketiga. Plaintif memasukkan kaveat persendirian atas hartanah tersebut dan mengeluarkan notis tuntutan, menuntut agar defendan mematuhi terma SSA pertama. Sekitar tahun 2014, defendan menawarkan untuk menjual hartanah tersebut kepada plaintif dan menuntut agar harga pembelian penuh dibayar dalam masa enam bulan. Plaintif memfailkan saman pemula di Mahkamah Tinggi terhadap defendan untuk pelaksanaan spesifik. Mahkamah Tinggi memutuskan memihak kepada plaintif dan SSA pertama didapati tidak sah ab initio. Oleh itu, rayuan ini.

Diputuskan, menolak rayuan dengan kos:

(1) Ketiadaan inherens pengarah dan setiausaha syarikat yang didakwa untuk memasuki SSA pertama menyebabkan SSA pertama dan instrumen berikutnya tidak sah dan terbatal ab initio. Antara tahun 2005 dan 2014, tiada pihak yang mengambil sebarang langkah untuk menguatkuasakan mana-mana terma yang dipersetujui bawah DOS. Rekod Suruhanjaya Syarikat Malaysia dengan jelas menunjukkan bahawa, Murugayah, iaitu pengarah, hanya dilantik sebagai pengarah plaintif pada tahun 2010. Murugayah telah menandatangani DOS pada

tahun 2005. Oleh itu, pelaksanaan DOS oleh Murugayah tidak mempunyai asas undang-undang. Tidak ada bukti kebenaran diberikan kepada Murugayah untuk menandatangani DOS bagi pihak plaintif. DOS tidak mengikat defendan (lihat perenggan 29 & 32).

(2) Pihak-pihak hanya tersedar pada 2014, hampir 15 tahun selepas pelaksanaan DOS. Terdapat persetujuan dan pengecualian oleh kedua-dua plaintif dan defendan mengenai kelewatan menguatkuasakan DOS. Tambahan lagi, 15 tahun selepas pelaksanaan DOS, penjualan dan pemindahan saham, sebagaimana yang dipersetujui di bawah DOS, belum dapat dicapai dan disimpulkan (lihat perenggan 36).]

Notes

For cases on specific performance in general, see 3(4) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 7373–7467.

Cases referred to

Alfred Templeton & Ors v Low Yat Holdings Bhd & Anor [1989] 2 MLJ 202; [1989] 1 CLJ Rep 219; [1989] 1 CLJ 693, HC (refd)

Archibald v Scully [1861] IX HLC 360 (refd)

Cheah Kim Tong & Anor v Taro Kaur [1989] 3 MLJ 252; [1989] 1 CLJ Rep 378; [1989] 2 CLJ 791, HC (refd)

Foo Holdings Sdn Bhd & Anor v Foo Choon Ying [2013] MLJU 1638; [2013] 1 LNS 908, HC (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Lee Ing Chin @ Lee Teck Seng v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)

Lindsay Petroleum Co v Hurd (1874) LR 5 PC 221 (refd)

Saw Seng Kee v Nadzri & Ng Securities Sdn Bhd [1996] 2 MLJ 238; [1997] 2 CLJ 445, CA (refd)

Appeal from: Civil Suit Nos 24NCC-337–09 of 2015 and 24NCC-91–03 of 2015 (High Court, Kuala Lumpur)

GK Ganesan (L Nagarajan, KN Geetha and CC Lam with him) (Gulam & Wong) for the appellant.

Joshua Kevin Sathiseelan (Leng Wie Mun with him) (Kevin & Co) for the respondent.

Hasnah Hashim JCA (delivering judgment of the court):

[1] There were two appeals before us emanating from a single judgment of the learned High Court judge given on 4 April 2016 allowing the respondent's

originating summons ('the OS') granting the declaration and orders sought. The two appeals are as follows:

(a) Civil Appeal No W-02(NCC)(A)-730–04 of 2016; and

(b) Civil Appeal No W-02(NCC)(A)-731–04 of 2016.

[2] Civil Appeal No W-02(NCC)(A)-730–04 of 2016 is the appeal against the decision of the learned High Court judge in respect of the OS filed by the defendant to declare the first SSA as void ab initio (24NCC-337–09 of 2015).

[3] Civil Appeal No W-02(NCC)(A)-731–04 of 2016 is the appeal against the decision of the learned High Court judge in respect of the originating summons ('the OS') filed by the plaintiff (24NCC-91–03 of 2015) seeking the following reliefs:

(a) a declaration that the plaintiff is the beneficial shareholder of 51% shares held in the fourth defendant pursuant to cl 5.1.1 of the deed of settlement;

(b) an order that pending the payment of the balance sum of RM2,183.887.50 by the plaintiff to the first, second and third defendants pursuant to cl 5.1.1(E) of the deed of settlement, the shares of 51% of the fourth defendant shall be held on trust by the first defendant on behalf of the plaintiff;

(c) an order for full payment of the sum of RM2,183,887.50 by the plaintiff to the first,second and third defendants and within seven days of the payment, transfer and register the said shares of 51% of the fourth defendant in favour of the plaintiff;

(d) an order to compel the first, second and third defendants to convene a board meeting to appoint Murugayah a/l Kanapathy and Vinayak a/l Murugayah and Dhinesh a/l Athinarayanan to be directors of the fourth defendant;

(e) alternatively, an order that the first and third defendants pass a directors' circular resolution to appoint Murugayah a/l Kanapathy and Vinayak a/l Murugayah and Dhinesh a/l Athinarayanan to be directors of the fourth defendant;

(f) an order for specific performance of cl 5.1.3 of the deed of settlement for the appointment of Murugayah a/l Kanapathy and Vinayak a/l Murugayah and Dhinesh a/l Athinarayanan to be directors of the fourth defendant;

(g) a declaration that pursuant to cl 5.1.4 of the deed of settlement the plaintiff's representative shall be appointed as the managing director in

A the fourth defendant. The existing company secretary shall resign and a new company secretary shall be appointed by the plaintiff;

(h) an order that pursuant to cl 5.1.7 of the deed of settlement the third defendant as the fourth defendant's company secretary hand over the
B original issue documents of title to the land, secretarial files and all other documents relating to the affairs of the fourth defendant and the property shall be deposited with the plaintiff and/or its representatives;

(i) general damages;

C (j) an order of perpetual injunction to restrain the fourth defendant either on its own, directors, officers, workers, agents, services and/or any persons under the fourth defendant's instructions to act on behalf of the fourth defendant from transferring the title and/or shares in the fourth defendant to any parties other than the plaintiff;

D (k) costs; and

(l) any other relief the court thinks fit and just.

[4] By an application (encl 6(a)) filed in this court by the appellant, this
E court ordered that the appeals be heard together as both the appeals involved the same parties and subject matter. We had on 26 September 2017, after hearing submissions from learned counsel for the appellant and the respondents, unanimously dismissed both appeals with costs of RM20,000. We set out below our reasons for affirming the decision of the High Court.

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[5] For ease of reference in this judgment the parties will be referred to as they were in the High Court in Suit No 24NCC-337–09 of 2015. The appellant is the plaintiff and the respondents are the defendants before the High Court. The background facts of this appeal are important to understand
G the context in which these appeals were brought.

MATERIAL FACTS

[6] The sixth defendant is the registered owner of a piece of land held under
H the title HS (D) 44105, PT No 1352 Mukim Ulu Semenyih, Daerah Ulu Langat, Selangor Darul Ehsan ('the property'). The first, second, third and fourth defendants are shareholders in the sixth defendant. The first defendant held 51% shares and the second, third and fourth defendants each held 100 shares. The fifth defendant was appointed as a director of the sixth defendant
I on 26 May 2004 and is the company secretary since 2 March 1992.

[7] The first, second, third and fourth defendants entered into a share sale agreement ('the first SSA') on 5 January 2000 to sell their shares to the appellant for the sum of RM6,120,000. The appellant agreed to purchase 51% of the

issued and paid-up share capital in the sixth defendant. The sixth defendant was desirous of developing the property into an agro-tourism cum mixed development project.

[8] On 27 May 2004 the first, second and fifth defendants executed a deed of revocation with the appellant ('the deed of revocation') to rescind the first SSA on the grounds that the first defendant breached the first SSA and to substitute it with a new shareholder agreement ('the second SSA'). Subsequently, on 19 January 2005 the first, second and fifth defendants executed a deed of settlement ('the deed of settlement') with the plaintiff where it was agreed again that the first SSA be rescinded. At the time the deed of settlement was executed, the parties have yet to enter into the second SSA.

[9] Simultaneously, the first defendant also executed a deed of trust dated 19 January 2005 with the plaintiff, Cita Cemerlang Sdn Bhd ('Cita'), Nilai Pengkalen Sdn Bhd ('Nilai') and one Thong Yoong Kooi ('the deed of trust'). Under the said deed of trust, it was agreed that the first defendant be appointed as the trustee and Cita, Nilai and Thong are the beneficiaries of the trust.

[10] The plaintiff contended that the defendants had breached the deed of settlement for failing to develop the property and by offering the sale of the sixth defendant's shares to a third party, Nirvana Memorial Park Sdn Bhd ('Nirvana') even though the plaintiff held 51% shares and is the majority shareholder. On 8 December 2014 the plaintiff lodged a private caveat on the said property to preserve its rights. The plaintiff issued notices of demand demanding the defendants to comply with the terms of the first SSA. Sometime in 2014 the defendants offered to sell the property to the plaintiff and demanded the full purchase price be paid within six months. The plaintiff, however, requested to pay the purchase price within two years which was not accepted by the defendants.

[11] The plaintiff filed an OS dated 4 March 2015 against the defendants for specific performance (24NCC-91–03 of 2015). The defendants, a few months later, filed an OS 24NCC-337–09 of 2015 seeking declarations to set aside the first SSA, to invalidate the deed of revocation and the deed of settlement.

DECISION OF THE HIGH COURT

[12] The learned High Court judge gave judgment in favour of the plaintiff. In Her Ladyship's judicial appreciation of the evidence, she concluded as follows:

(a) that the first SSA is void ab initio as the plaintiff failed to adduce any documentary proof that Murugayah a/l Kanapathy ('Murugayah') who had signed on behalf of the plaintiff was the director of the plaintiff

when the first SSA was executed and was authorised to sign the said agreement. Furthermore, based on the documentary and oral evidence, Thong Yoong Kooi ('Thong') was not the company secretary of the plaintiff when the first SSA was executed. There was no board resolution authorising Murugayah and Thong to sign the aforesaid agreement. Following from her finding above, the learned judge went on to hold that:

> (31) Berdasarkan di atas, saya berpendapat PJBS adalah tidak sah sejak mula (void ab initio) dan terbatal kerana materai syarikat diletakkan di hadapan orang yang tidak mempunyai kuasa dan tidak diretifikasikan melalui resolusi syarikat. Oleh itu kontrak atau PJSB tidak boleh dikuatkuasakan oleh mana-mana pihak.

(b) since the first SSA is void ab initio, both the deed of revocation and the deed of settlement cannot be enforced. The learned High Court judge explained in her grounds of judgment:

> (37) Saya berpendapat seksyen 63 hanya terpakai meliputi keaadaan di mana ada novasi atau apabila pihak-pihak (rescind) kontrak yang terdahulu dan menggantikan dengan yang baru. Oleh itu perjanjian kedua telah membatalkan yang pertama. Dalam kes di sini saya berpendapat oleh kerana PLBS adalah tidak sah dari mula (void ab initio) kerana kegagalan mematuhi statut, dengan itu tiada apa yang hendak dibatalkan. Oleh kerana Deed of Revocation dan deed of Settlement berasaskan kepada PJBS yang tidak sah dari mula dan terbatal maka kedua-dua Deed of Revocation dan Deed of Settlement tidak boleh di kuatkuasakan.

THE COMPETING CONTENTIONS

[13] Learned counsel for the plaintiff and defendants submitted at length before us on their competing contentions. In summary for the plaintiff the contentions were that:

(a) the plaintiff discovered that the defendants had altered the sixth defendant's capital structure and therefore breached the first SSA. The defendants agreed to rescind the first SSA and parties executed the deed of revocation;

(b) the parties then executed the deed of settlement subject to the following terms and conditions:

(i) the plaintiff to be given 51% of the shares in the sixth defendant;

(ii) the sixth defendant to develop the property; and

(iii) the defendants breached the deed of settlement for not developing the property and by offering the shares in the sixth defendant to Nirvana;

(c) the learned High Court judge erred for not considering whether the defendants had breached the terms of the deed of settlement. The effect of rescission by mutual agreement is clear that the first SSA is extinguished;

(d) the learned High Court judge failed to consider the existence of laches. The first SSA was executed in 2000, however, there was no complaint of any irregularity until fifteen years later by the defendants. By their own conduct the defendants had waived their rights to the irregularities as they executed the deed of revocation and the deed of settlement; and

(e) there is no nexus between the first SSA and the deed of settlement.

[14] For the defendant, it was contended that:

(a) Murugayah a/l Kanapathy and Thong were not directors of the plaintiff when the first SSA was executed. The first SSA is therefore not binding on the defendants. The plaintiff cannot rely on the terms of the first SSA;

(b) unjust enrichment by compelling the defendants to surrender the 51% of the issued and paid-up share capital of the defendants to the plaintiff; and

(c) upon revoking the first SSA, the defendants were compelled to execute the deed of settlement.

OUR DECISION

The law

[15] We are mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance. The general principle is that the conclusion of a trial judge is a finding of fact on the oral evidence based on the demeanour and credibility of the witnesses before him or her. Generally, such finding ought not be disturbed unless the appellate court is convinced that it is wrong. It would not be sufficient to warrant any interference merely because the appellate court entertains doubt whether such finding is right (see: *Lee Ing Chin @ Lee Teck Seng v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19, *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309).

[16] The appellate court must be slow to interfere with the findings made by the trial court unless if it be shown that there was no judicial appreciation of the evidence adduced before it.

[17] Having set out the legal principles underlying appellate intervention, we now turn to the facts of the present case.

The first SSA

[18] The first defendant was at all material times a major shareholder of the sixth defendant. On 5 January 2000 the plaintiff entered into an agreement with the first, second, third and fourth defendants to purchase 612 issued shares representing 51% of the entire issued shares in the sixth defendant. It was also agreed that the purchase consideration of the sale of shares shall be based on the value attached to 51% of an area measuring approximately 100 acres of the property.

[19] The parties agreed that the purchase consideration of the sale of shares shall be the sum of RM6,120,000 only. According to the terms of the first SSA, the defendants agreed not to issue new shares in the sixth defendant or cause any changes in the capital structure of the sixth defendant without the prior written approval of the plaintiff as the new shareholders.

[20] The parties then executed a series of agreements after the first SSA:

(a) the deed of revocation on 27 May 2004; and

(b) the deed of settlement on 19 January 2005.

The deed of revocation

[21] The deed of revocation was entered on 27 May 2004 between the first, second and fifth defendants and the plaintiff. The defendants named in the deed of revocation acknowledged that they have made changes in the capital structure of the sixth defendant. The parties agreed to rescind the first SSA subject to the following terms:

(a) simultaneously with the execution of the deed of revocation, the defendants, as the existing shareholders, shall enter into a new shareholders agreement with the plaintiff, as the new shareholders, based on the following terms:

(i) the defendants shall sell and the plaintiff shall purchase the 51% equivalent to 1250 issued and paid up shares in the sixth defendant;

(ii) the sixth defendant shall own the entire 124.250 acres of the property at all times and the plaintiff equity participation of 51% in the sixth defendant shall encompass the entire acreage of the property;

(iii) that the share consideration payable by the plaintiff shall be based on 51% of the agreed value per acre for the total acreage of the property which is agreed at RM65,000 per acre;

(iv) the plaintiff as the new shareholders shall pay the sum of RM4,118,887.50 representing 51% of the agreed value for the entire acreage of the property less the sum of RM1,9350 being the sum deducted for the following:

(A) the sum of RM1,500,000 advanced to the defendants pursuant to the joint venture agreements ('JVA');

(B) the sum of RM135,000 being the cost and expenses incurred by the plaintiff pursuant to the JVA; and

(C) the sum of RM300,000 being the sum due and owing by the defendants to Mr Chieng Hock Lay and Madam M Shanti a/p Muniandy @ Munusamy.

The balance of RM2,183,887.50 shall be paid by the plaintiff to the defendants as existing shareholders at the time and manner to be stipulated in the new share sale agreement; and

(b) the original issue document of title to the property shall be deposited with the plaintiff.

The deed of settlement

[22] The first, second and fifth defendants and the plaintiff then executed a deed of settlement on 19 January 2005. The terms of the deed of revocation and the deed of settlement are similar except for a new clause, cl 5.1.1 (E) which provides as follows:

(E) that the Share Consideration less the sum deducted under Clause 5.1.1 (D) above amounting to the sum of RM2,183,887.50 (hereinafter referred to as'Balance Share Consideration') shall be paid by the New Shareholders to the Existing Shareholders by adopting (at the New Shareholders election) to any one or all of the options available as follows:-

(i) in the event the New Shareholders shall secure financing facility from any Banks and/or financial institutions (hereinafter referred to as 'Financier') for the Development Project as may be proposed on the Land then upon drawdown of the said financing facility the New Shareholders shall cause the progressive release of part of the Balance Share Consideration. For the purposes of this Clause the quantum of each progressive release of the Balance Share Consideration shall be decided by the New Shareholders; AND/OR

(ii) in the event the Company has commenced work on the proposed Development Project, the New Shareholders' portion of profits representing fifty-one (51%) of the total profits derived from the

operation of the Development Project available for distribution between the shareholders of the Company shall be progressively deducted and paid to the Existing Shareholders being settlement towards the Balance Share Consideration as shall remain outstanding to the Existing Shareholders. For the purpose of this Clause 'Profit' derived from the operation of the Development Project shall be determined by an independent Auditor appointed by the Company; AND/OR

(iii) in the event the Land is deemed not economically feasible for the purposes of the proposed Development Project then in such event the Board of Directors of the Company shall by a unanimous vote decide to deal with the Land in the manner deem fit whereupon the time and manner of the Balance Share Consideration payable to the Existing Shareholders shall be deliberated.

PROVIDED ALWAYS THAT in the event the New Shareholders electing to settle the Balance Share Consideration in the manner stated under Clause 5.1.1 (E) (i) above then the New Shareholders shall guarantee and indemnify the Existing Shareholders as regards to the payment of the principal and interest amount payable in respect of the loan facilities utilized for the purposes of paying the Balance Share Consideration.

[23] The deed of revocation was executed on 27 May 2004. However, six months later, on 19 January 2005 the deed of settlement was executed by the parties. Clause 5.1 of the deed of settlement rescinded the first SSA which was already rescinded in May 2004 by the deed of revocation. The terms of the deed of settlement do not make any reference to the deed of revocation. The signatories of the deed of settlement and the deed of revocation are the same persons.

[24] On the same date that the deed of settlement was executed the first defendant and the plaintiff, together with three others being the beneficial owners of the plaintiff, executed a deed of trust. By the deed of trust the first defendant, as the trustee, agreed that pending the transfer of the beneficial equity to the plaintiff the parties agreed to allot to the trustee to hold the beneficial equity together with the rights and liabilities of Kristal Klasik. The balance monies for the beneficial equity due and owing by the plaintiff to the first defendant shall be provided for and borne by the beneficiaries in the following proportions:

(a) Cita 45.84%;

(b) Nilai 29.15%; and

(c) Thong Yong Koi 25%.

[25] By a letter dated 14 September 2015 the first defendant through his solicitors, Tetuan Mazlan Senggari informed the plaintiff that the first SSA is

null and void:

> Adalah dimaklumkan bahawa pada 14/09/2015 anakguam kami mendapati bahawa saksi cop mohor ('common seal') Exotic Skyline Sdn. Bhd. (No. Syarikat: 386887-H) yang diletakkan di 'Sale And Purchase of Shares Agreement' bertarikh 05/01/2000 (perjanjian dengan anakguam kami) dipercayai telah disaksikan dan ditanda tangani oleh seorang individu bernama Murugayah a/l Kanapaty (No KP 580813-08-5317) yang bertindak sebagai Pengarah dan Thong Yoong Kooi (No KP 600812-10-6193) yang bertindak sebagai Pengarah/Setiausaha yang mana kedua-dua individu tersebut bukanlah Ahli Lembaga Pengarah dan/atau Setiausaha syarikat Exotic Skyline Sdn. Bhd. (No Syarikat: 386887-H). Tindakan mereka berdua sesungguhnya telah menyalahi peruntukan dibawah Akta Syarikat, 1965 dan telah menyebabkan 'Sale And Purchase of Shares Agreement' bertarikh 05/01/2000 itu tidak sah dan terbatal dengan sendirinya. Sehubungan dengan itu mana apa-apa perjanjian, kontrak, suratcara dan/atau lain-lain dokumen yang bermula dan mengambil punca asalnya daripada 'Sale And Purchase of Shares Agreement' bertarikh 05/01/2000 yang mana semuanya berkait rapat, tertakluk, dirujuk dan/atau merujuk perlu dibaca bersama dengan 'Sale And Purchase of Shares Agreement' bertarikh 05/01/2000 yang kemudiannya di tanda tangani oleh pihak-pihak yang terlibat selepas tarikh 05/01/2000 termasuk'Deed of Revocation' bertarikh 24/05/2004 dan 'Deed of Settlement' bertarikh 19/01/2005 adalah tidak sah dan terbatal dengan sendirinya atau secara otomatik.

[26] Learned counsel for the defendants argued in his submission that the first SSA was in effect null and void as the signatories signing on behalf of the plaintiff had no authority to do so. The learned High Court judge concluded that because of the lack of authority to sign on behalf of the plaintiff, the first SSA and all subsequent agreements are null and void.

[27] By the terms of the instruments the parties had mutually agreed to rescind the first SSA, thus extinguishing their rights and obligations under the said first SSA. Therefore, the deed of revocation and the deed of settlement had rescinded the first SSA. The parties agreed that upon the execution of the deed of settlement, the defendants undertook to do the following:

(a) transfer the 51% of the entire issued and paid up capital shares in Kristal to the plaintiff;

(b) the plaintiff's equity participation of 51% in Kristal shall encompass the entire acreage of the property;

(c) the share consideration payable shall be calculated at the rate of RM65,000 per acre amounting to the sum of RM4,118,887.50;

(d) the share consideration shall be subjected to the deduction of the sum of RM1,935,000 (the sum of monies advanced to the defendants pursuant to the JVA referred to in the rescinded first SSA); and

(e) the share consideration less the sum deducted as stipulated in cl 5.1.1(D) amounting to RM2,183,887.50 shall be paid by the plaintiff to the defendants according to the options as provided under cl 5.1.1(E).

[28] Learned counsel for the plaintiff argued that the defendants had breached the deed of settlement for not developing the property and had allowed illegal mining on the said property. The defendants had offered the sale of the fourth defendant's shares to Nirvana even though the plaintiff is 51% beneficial owner of the shares. The plaintiff sent letters of demands to the defendants in 2014 demanding that the defendants comply with the terms of the second agreement which is the deed of settlement. Prior to the letters of demand on 30 May 2014 Dato' Karim, Hamid, Murugayah, Lee and Vinayak met to discuss the issues arising from the deed of settlement. According to the minutes of the meeting held on 30 May 2014 the parties agreed to the following:

1. Mr. Murugayah proposed to Haji Hamid that he and Dato' Karim have agreed to settle the RM2,183.887.50 which is owing to him pursuant to the deed of settlement and henceforth to register 51% shareholding in Kristal Klasik Sdn. Bhd. In favour of Exotic Skyline Sdn. Bhd. and that they will have the option to purchase the remaining 49% shareholding from Haji Hamid and others.

2. Haji Hamid agreed to this proposal.

3. Dato' Karim also expressed his desire not to proceed further with the development and that he wished to sell all his shares to Murugayah on the same terms.

4. Mr. Murugayah responded that he offered the proposal to Haji Hamid based on the understanding with Dato' Karim to work together, to settle the RM2,182,887.50 to Haji Hamid and together to develop the Land and to raise the balance payment of RM9,740,800 to Haji Hamid. By this decision of Dato' Karim, this will not only impose the full burden on Murugayah to pay to Haji Hamid the sum of RM9,740,800 but also impose an extra burden of paying Dato' Karim and the group a further sum of RM7,520,150. Added to this, Mr. Murugayah has to incur all planning and development cost solely by himself. This defeats the original intention of the parties to develop the land by incurring a minimum upfront payment for the Land.

5. Dato' Karim replied saying that Mr. Murugayah can invite some investor and/or joint venture partners to share the responsibility of paying the money to Haji Hamid and to himself.

6. It was agreed that Murugayah shall pay Haji Hamid RM1,883,887.50 (RM2,183,887.50 less RM300,000) due under the deed of settlement. Upon payment of the said sum Haji Hamid will register 51%

shareholding of Kristal Klasik Sdn. Bhd. In favour of Exotic Skyline Sdn. Bhd. All other terms as contained in the deed of settlement shall be followed.

7. Mr. Murugayah also indicated that there are squatters and also goat rearing activities being carried out on the Land. Haji Hamid informed that he had no knowledge of the same and that he will take the necessary steps to clear the squatters.

8. All the outstanding quit rent and taxes amounting to RM100,000 in respect of the land, shall be apportioned 50-50 between Murugayah and Haji Hamid.

9. Mr. Murugayah also brought up the problem of the inconsistency and discrepancy of the shareholding pattern of Exotic Skyline Sdn. Bhd. as contained in the Register of Companies records and the Trust Deed dated 19th January 2005. Mr. Murugayah and Dato' Karim agreed to cooperate and regularize the records. (It is advisable that Exotic should be substituted by a new company as it will be too costly and messy to update the records and therefore Exotic should be wound up).

10. The balance payment of RM9,740,800 including a sum or RM7,520,150 to Dato' Karim and the group shall be paid within 2 years from the date of settlement of the RM2,183,887.50 to Haji Hamid).

[29] We agree with the learned High Court judge that the inherent absence of authority of Murugayah and Thong to enter into the first SSA has rendered the first SSA and the subsequent instruments a nullity and void ab initio. We would further add that on the facts and evidence, between the years 2005 and 2014, neither party took any steps to enforce any of the terms as agreed under the deed of settlement. The records of the Companies Commission of Malaysia ('CCM') clearly revealed that Murugayah was only appointed as a director of the plaintiff on 25 October 2010. However, Murugayah had signed the deed of settlement on behalf of the plaintiff on 19 January 2005. It is quite plain, therefore, to conclude that the execution of the deed of settlement by Murugayah lacked any legal premise.

[30] There was no evidence of any authorisation given to Murugayah to sign the deed of settlement on behalf of the plaintiff. Neither was there any evidence before the court that there was a plaintiff's board of directors' resolution ratifying the said deed of settlement.

[31] The Court of Appeal in *Saw Seng Kee v Nadzri & Ng Securities Sdn Bhd* [1996] 2 MLJ 238; [1997] 2 CLJ 445 referred to *Company Law, Pennington*, (2nd Ed) pp 112–113:

> The first question to be asked is whether the person who relied on the documents was entitled to assume that the board of directors had authorised its execution. If the document was signed by a director and the only defect alleged is that no proper

A board meeting was held, the outsider is entitled to make this assumption, and the company cannot contend that the document is a forgery. If, however, the document was not signed by a director but by another person, the outsider must show that the board has held out that person as having authority to sign on behalf of the company, which it may have done by appointing him to a position under the company which B in other companies normally carries the power to sign the kind of document in question. The company is then bound by the document because it was signed by a person who had apparent authority to sign it, and the company is estopped from denying his authority. But if signing the document was not within the apparent authority of the person who signed it, the outsider who relies on it cannot treat it as having been signed on the company's behalf ... C

[32] The CCM search revealed that Murugayah was not a director of the plaintiff's company at the material time that he signed the deed of settlement. Since Murugayah had no apparent authority to sign the deed of settlement, and D there was no evidence, whether express or by necessary implication that the deed of settlement was ratified by the plaintiff's board of directors, we are of the view that the said deed of settlement is thus not binding on the defendants.

Laches

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[33] Learned counsel for the plaintiff submitted that the learned High Court judge failed to consider the defendants' laches. Since the year 2000 there was no complaint of any alleged irregularity of the first SSA.

F **[34]** For laches to be raised, there must be delay amounting to acquiescence (see: *Cheah Kim Tong & Anor v Taro Kaur* [1989] 3 MLJ 252; [1989] 1 CLJ Rep 378; [1989] 2 CLJ 791; *Foo Holdings Sdn Bhd & Anor v Foo Choon Ying* [2013] MLJU 1638; [2013] 1 LNS 908; *Archibald v Scully* [1861] IX HLC 360).The doctrine of laches is based on the maxim that 'equity aids the vigilant G and not those who slumber on their rights.' Lord Selborne succinctly explained in the landmark case of *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221:

But in every case if an argument against relief which otherwise would be just is founded on mere delay, that delay of course not amounting to a bar by any Statute of Limitations, the validity of that defence must be tried upon principles H substantially equitable. Two circumstances always important in such cases are the length of the delay, and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other so far as relates to the remedy.

I **[35]** Edgar Joseph Jr J of the High Court of Penang in the case *Alfred Templeton & Ors v Low Yat Holdings Bhd & Anor* [1989] 2 MLJ 202; [1989] 1 CLJ Rep 219; [1989] 1 CLJ 693 held as follows:

Laches is an equitable defence implying lapse of time and delay in prosecuting a claim. A court of equity refuses its aid to a stale demand where the plaintiff has slept

upon his rights and acquiesced for a great length of time. He is then said to be barred by laches. In determining whether there has been such a delay as to amount to laches the court considers whether there has been acquiescence on the plaintiff's part and any change of position that has occurred on the part of the defendant. The doctrine of laches rests on the consideration that it is unjust to give a plaintiff a remedy where he has by his conduct done that which might fairly be regarded as equivalent to a waiver of it or where by his conduct and neglect he has, though not waiving the remedy, put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted: '14 Halsbury's Laws of England (third Ed) paras 1181, 1182. Laches has been succinctly described as 'inaction with one eye's open".

[36] In the appeal before us both parties awoke from their slumber only in 2014, almost 15 years after the execution of the deed of settlement. Based on the conduct of both parties and the minutes of the meeting held on 30 May 2014 there were acquiescence and waiver by both the plaintiff and the defendants on the delay of enforcing the deed of settlement. Furthermore, 15 years after the execution of the deed of settlement the sale and transfer of the shares as agreed under the deed of settlement have yet to be materialised and concluded.

CONCLUSION

[37] The findings by the learned judge in this case are primarily findings of facts upon Her Ladyship's analysis and judicial appreciation of the contemporaneous documentary evidence. It is trite law that the appellate court rarely disturbs or interferes with such findings unless it is so obvious that such findings or inferences of fact are not supported by the evidence, or that such findings or inferences are inconsistent when tested against the contemporaneous documentary evidence.

[38] After hearing respective learned counsel and upon due consideration of their oral submissions, written submissions and the records of appeal we find no merits in the appeals. We do not find any appealable error in the decision of the High Court judge to warrant our appellate intervention. Accordingly, we dismissed both the appeals with agreed costs of RM20,000 subject to the payment of allocator. We affirmed the decision of the High Court. We further ordered that the defendants in both appeals pay to the plaintiff the sum of RM1,935,000 within 60 days of the order. The deposit for both appeals be refunded.

A *Order accordingly.*

Reported by Afiq Mohamad Noor

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